

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

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| In the Matter of the Joint Application of |) | |
| |) | |
| Axia NetMedia Corporation, Transferor |) | |
| Axia NGNetworks USA, Inc., Licensee |) | |
| |) | |
| and |) | |
| |) | |
| Axia NGNetworks Trust, Transferee |) | |
| FSM Management, LLC, Operating Trustee |) | |
| |) | WC Docket No 16-206 |
| |) | |
| Application for Authorization Pursuant to |) | |
| Section 214 of the Communications Act of 1934, |) | |
| As Amended, for Transfer of Control of |) | |
| Axia NGNetworks USA, Inc., an authorized |) | |
| Domestic Section 214 Carrier, to |) | |
| Axia NGNetworks Trust |) | |

Joint Opposition to Massachusetts Technology Park Corporation's
Petition for Reconsideration

Introduction

Pursuant to 47 C.F.R. § 1.106(g), Axia NetMedia Corporation ("Axia Canada"), Axia NGNetworks USA, Inc. ("Axia U.S."), Axia NGNetworks Trust ("the Trust"), and FSM Management, LLC ("Operating Trustee") file this Joint Opposition to Massachusetts Technology Park Corporation d/b/a Massachusetts Technology Collaborative's ("MTC") Petition for Reconsideration.

The Federal Communications Commission ("Commission" or "FCC") granted approval for the transfer of control of the domestic blanket Section 214 authorization of Axia U.S. to the Trust on July 29, 2016. MTC, a contract counterparty and litigation adversary of Axia U.S., has

asked the Commission to reverse its approval. MTC flouts Commission precedent and rules and seeks relief that would be contrary to the public interest in an effort to achieve leverage in its contract and litigation disputes with Axia U.S.

Background

On June 22, 2016, Axia Canada, Axia U.S., and the Trust (collectively “Applicants”) filed a Joint Application for Domestic Transfer of Control (“Joint Application”) pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Sections 63.03 and 63.04 of the Commission’s rules, 47 C.F.R. §§ 63.03, 63.04.¹ Applicants requested the Commission’s approval to transfer control of the Axia U.S. blanket domestic Section 214 authorization to the Trust as part of a transaction whereby the Trust would acquire all outstanding and issued stock of Axia U.S. *Joint Application* at 1.

In the Joint Application, Applicants described the middle mile network (“MTC Network”) operated by Axia U.S. for MTC. *Id.* at 7. Applicants also described the Master Agreement for Network Operator Services (“Master Agreement”) that assigned Axia U.S. responsibilities as operator of the MTC Network. Applicants showed that after the transfer of

¹ The Joint Application was filed on June 22, 2016 and posted on the Commission’s Electronic Comment Filing System (“ECFS”) on June 23, 2016. Applicants submitted a Supplement to the Joint Application on June 24, 2016.

On June 28, 2016 the FCC published Public Notice establishing a Streamlined Pleading Cycle, and assigning the Joint Application WC Docket No. 16-206. *See Public Notice: Domestic Section 214 Application Filed to the Transfer of Control of Axia NGNetworks USA, Inc. to Axia NGNetworks Trust Streamlined Pleading Cycle Established*, WC Docket No. 16-206, DA 16-733 (June 28, 2016). According to the Public Notice, interested parties were required to file comments on or before July 12, 2016. The Public Notice provided that unless otherwise notified, Applicants would be authorized to transfer control on the 31st day after the filing of the Public Notice.

The Wireline Competition Bureau (“WCB”) requested that Applicants provide further documentation to supplement the Joint Application, including (1) the agreement for the acquisition of Axia Canada by Digital Connection (Canada) Corp. (“DCC”); (2) a trust agreement (“Trust Agreement”) between Axia Canada, as Depositor, and FSM Capital Management LLC (“FSM” or “Operating Trustee”); and (3) a statement of consent whereby DCC consented to Axia Canada’s execution of the Trust Agreement and transfer of all Axia U.S. shares to the Trust. Those documents were filed via ECFS on June 30, 2016.

control of Axia U.S. to the Trust, Axia U.S. would provide high quality telecommunications services on the MTC Network to its existing customer base in Western Massachusetts. *Id.* at 10.

No party submitted comments on the Joint Application, and the WCB granted approval for the transfer of control on July 29, 2016. *See Public Notice: Notice of Domestic Section 214 Authorizations Granted*, WC Docket Nos. 16-195 and 16-206, DA 16-866 (July 29, 2016). On August 2, 2016, Applicants filed a Notice of Consummation of the transfer of control. After Axia U.S. was transferred to the Trust, DCC acquired Axia Canada. The acquisition did not involve any entity providing telecommunications in the United States.

On August 24, 2016, MTC filed its Petition for Reconsideration (“Petition”). MTC urges the Commission to reconsider its grant of authorization for the Joint Application, even though the transaction was duly reviewed and approved by the Commission and was consummated. *Petition* at 2. MTC’s main contentions for reconsideration are that the Joint Application violated the Master Agreement and is an “end-around” to an injunction from a Massachusetts court requiring Axia U.S. to continue to perform all of its payments and obligations under the Master Agreement. *Id.* MTC asks the Commission to comply with what MTC erroneously contends are governing terms of the Master Agreement by revoking the Commission’s approval for the transfer of control to the Trust.² *Id.* at 5-6.

² MTC does not cite the language of the Master Agreement that provides the only available recourse for MTC. The Master Agreement has no term requiring Axia U.S. to notify MTC when entering into a transfer of control. The Master Agreement provides that if there is a change of control of the Network Operator without MTC’s consent: “MTC, or its successor, may terminate the Agreement with one hundred eighty (180) days prior written notice to Network Operator given not later than fourteen (14) days after the notice of the occurrence of such change of control.” *Master Agreement*, § 8.1.4 (emphasis added). As discussed below, Applicants understand that the FCC does not consider private contractual matters when reviewing transfer of control applications. For context, Applicants note here that MTC has allowed the 14 day period to lapse without invoking its sole remedy for a transfer made without its consent and without taking any other action beyond filing its Petition.

Argument

I. The Commission Consistently Holds that It Is Not the Proper Forum for Consideration of Private Contract or State Court Matters Raised in Respect of Applications for Transfer of Control.

In the face of extensive Commission precedent, MTC argues that the Commission action on the Joint Application should be controlled by the Master Agreement, a private contract between MTC and Axia U.S. *Petition* at 3-6. The FCC, however, has repeatedly held that “[i]t is well established that the Commission is not the proper forum for resolving private contractual disputes, and that the Commission will not defer action on transfer applications pending state court litigation or private contractual matters.” *Domestic Section 214 Application Filed for the Transfer of Control of Stanacard, LLC*, Public Notice, 27 FCC Rcd. 2381, 2383, WC Docket No. 12-18 (WCB 2012); *see also e.g., In re Applications of Cricket License Co.*, Memorandum Opinion and Order, 29 FCC Rcd. 2735, 2790, WT Docket No. 13-193 (WTB & IB 2014) (declining to impose certain conditions on transfer of control of wireless licenses and international Section 214 authorization because “such an action would be an inappropriate interference with a private contractual agreement.”); *In re Applications of Cellco P’ship, et al. For Consent to Assign or Transfer Control of Licenses*, Memorandum Opinion and Order and Declaratory Ruling, 25 FCC Rcd. 10985, 11021, WT Docket No. 09-121 (WTB & IB 2010) (rejecting objection to the transfer of certain wireless licenses and related authorizations because the “complaint constitutes a private contractual matter between [the parties], that is beyond the Commission’s jurisdiction.”); *In re Applications of AT&T Inc. and Cellco P’ship For Consent to Assign or Transfer Control of Licenses and Authorization*, Memorandum Opinion and Order, 25 FCC Rcd. 8704, 87632-63, WT Docket No. 09-104 (WTB 2010) (refusing to grant certain relief because the dispute “encompass[es] contractual matters in which the Commission ordinarily

does not become involved The [parties] are pursuing resolution of their respective claims ... in two separate courts, and we see no reason for the Commission to inject itself in that process. Moreover, we conclude, consistent with past practice, that the pendency of these legal proceedings should not cause us to delay our action on the pending ... applications.”), *reconsideration denied* 30 FCC Rcd. 992 (2015).

The Commission has even held that breach of a private contract by a transfer of control authorized by the Commission is a matter for resolution by courts of competent jurisdiction, not the Commission. See *In re Applications of AT&T Inc. and Cellco P'ship*, 25 FCC Rcd. at 8760-63; *In re Application of Wireless US, LLC, For Consent to Assignment*, Order, 22 FCC Rcd. 8643, 8645-46 (WTB 2007). The Commission clearly is not the proper forum for enforcement of the Master Agreement.

Undeterred, MTC suggests that “exceptions to that doctrine can be made in the case of a violation of FCC rules or a federal statute.” *Petition* at 5 (citing *Detroit Cellular Telephone Co.*, Memorandum Opinion and Order, 2 FCC Rcd 4420 (Mobile Services Division 1987)). MTC does not, however, cite a violation of FCC rules or a federal statute. Moreover, MTC misapplies the holding in *Detroit Cellular*. In *Detroit Cellular*, the Commission rejected a challenge to a transfer of control because the facts presented by the party opposing the transfer “demonstrate[d] private contractual problems that should be solved by negotiation between the parties.” *Id.* at 4420. *Detroit Cellular* does not recognize an exception to the Commission’s policy against intervening in private contractual disputes, but merely acknowledges that the Commission will enforce its own statutes and rules. *Id.* (“TRAC has failed to demonstrate that PacTel is guilty of violating any of the Commission’s rules”). In sum, *Detroit Cellular* does not support MTC’s

position that exceptions have been recognized to the FCC's long-standing policy of not intervening in private contractual disputes.

Nor does the existence of the state court injunction described in the Petition control Commission action. Contrary to MTC arguments, precedent holds that the FCC will continue to act on applications unless an injunction is specifically directed against the filing or processing of the application. *In re Application of Wireless US, LLC, For Consent to Assignment*, Order, 22 FCC Rcd. at 8645-46 (“Further, absent a final court judgment raising issues within the Commission’s jurisdiction, we would not ordinarily act on matters stemming from private contracts, and, absent a prior court injunction specifically directed against the filing or processing of the application, we would not ordinarily withhold consent to an otherwise acceptable application.”) (emphasis added). No such injunction exists here.

The injunction cited by MTC instructs Axia U.S. to “refrain from withholding all fees and payments to or on behalf of MTC in connection with [the MTC] fiber optic network which is currently the operator, and shall continue to perform those and its other obligations under its [Master Agreement] with MTC pending further order of this Court.” *Petition*, Ex. A (emphasis added). The injunction has no language “specifically directed against the filing or processing ...” of a transfer of control application by Axia U.S. *See In re Application of Wireless US, LLC, For Consent to Assignment*, 22 FCC Rcd. at 8645-46.

Following precedent, the FCC should not intervene in this private contractual matter between Axia U.S. and MTC and should reject the Petition.

II. MTC’s Petition for Reconsideration Does Not Show Good Cause for its Failure to Satisfy Filing Requirements or its Attempt to Introduce New Facts or Arguments.

The MTC petition for reconsideration of the Commission’s action is incomplete under the Commission’s rules. The Commission’s rules state that “[i]f the petition is filed by a person who

is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.” 47 C.F.R. § 1.106(b)(1) (emphasis added). Also, where a petition for reconsideration relies on facts or arguments not previously presented to the Commission or designated authority, it may only be granted (1) when “[t]he petition relies on facts or arguments which relate to events which have occurred or circumstances which have changes since the last opportunity to present such matters to the Commission;” (2) “the petition relies on facts or arguments unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity”; or (3) “[t]he Commission or the designated authority determines that consideration of the facts or arguments relied on is required in the public interest.” 47 C.F.R. § 1.106(b)(2)(i)-(ii), (c)(1)-(2).

MTC makes the unsupported allegation that it did not file a petition to deny approval during the comment period because “... it relied on Axia [Canada’s] and Axia [U.S.’s] prior representation to MTC that the application for transfer of control was between Axia [Canada] and [DCC], not an attempt to transfer Axia U.S. to a Trust.” *Petition* at 2. Even accepting the allegation as valid, however, the FCC has held that petitioners for reconsideration lack good cause for failing to participate in earlier proceedings merely because they lacked notice of the proceedings, because “public notice constitutes constructive notice to interested parties of the filing of an application.” *In re Rupert Murdoch (Transferor) Applications for Transfer of Control of Fox Television Stations, Inc.*, Memorandum and Opinion and Order on Reconsideration, 24 FCC Rcd. 5824, 5827 (2008); *see also In re Fox Television Stations, Inc.*;

Application for Renewal of License, Memorandum Opinion and Order, 29 FCC Rcd. 9564, 9580, MB Docket No. 07-260 (MB Aug. 8, 2014).

The Commission does not require that applications be served on those parties that may file in opposition. *See In re Rupert Murdoch*, 24 FCC Rcd. at 5827. The Commission has ruled that “would-be petitioner’s lack of actual notice of the pendency of a proceeding does not establish good cause for its failure to participate.” *In re Applications of Powell Meredith Commc’n Co.*, Memorandum Opinion and Order, 31 FCC Rcd. 2647, 2648 (2016).

MTC was not a party to the Joint Application proceeding and failed to file a petition during the 30-day period provided by Public Notice. In the Petition, MTC fails to show good cause for that failure. Public Notice serves as constructive notice of an application filed with the Commission. In this proceeding, WCB published Public Notice of the Joint Application as of June 28, 2016. MTC is in the telecommunications industry and by its own acknowledgement had actual notice of a pending transaction and that transfer of control proceedings would be required at the Commission. Commission rules and rulings treat the Public Notice as notice to MTC. MTC neglected or ignored the opportunity to monitor the Daily Digest or otherwise obtain information about the Public Notice.

Due to the lack of good cause to consider the Petition, the Commission and the WCB should dismiss MTC’s Petition.

III. Setting Aside, Dismissing, or Returning the Joint Application Would be Harmful to the Public Interest.

MTC makes groundless arguments that the approved transfer of control of the Section 214 authorization and the transfer of ownership of Axia U.S. are contrary to the public interest. Instead, grant of MTC’s requests to reverse the Commission’s approval, not to mention MTC’s

assumed reversal of the underlying corporate transaction, would be detrimental to the public interest.

MTC argues that the transfer of control of the Section 214 authorization is contrary to the public interest because the transfer of control of Axia U.S. to the Trust would allow the trustee “at the discretion of Axia [Canada], to liquidate Axia U.S. in violation of the injunction.” *Petition* at 4. Further, MTC states that “[i]f the transfer of control is allowed by the Commission, Axia U.S. can, at the discretion of Axia NetMedia ... be rendered insolvent and unable to perform its obligations under the Agreement as required by the injunction, and thereafter liquidated in violation of the injunction.” *Id.* MTC asks the Commission to reverse its consent to the transfer of control to prevent these alleged potential harms.

Contrary to MTC claims, Axia U.S. is not attempting to abandon its obligations. Through the Transition Services Agreement (“Services Agreement”) and a loan, both reviewed by WCB, Axia U.S. is positioned to continue to provide telecommunications services to customers utilizing the MTC Network. In the Joint Application, Applicants assured the FCC that the Trustee would assume “all rights, responsibilities, and de jure and de facto control” of Axia U.S. and would be “responsible for operating the company to continue providing service to existing customers in Western Massachusetts *under the same rates, terms, and conditions ...*” as applied prior to the transfer. *Joint Application* at 3-4. Applicants noted that the grant of the Joint Application would allow Axia U.S. to continue to provide high quality telecommunications services on the MTC Network to existing MTC customers in Western Massachusetts. *Id.* at 10. Nothing about the representations of the Applicants or the structure and financing of the Trust suggest that Axia U.S. is defaulting or plans to default on any obligation or to violate any court

order. In fact, the operations of Axia U.S. in service to MTC customers have continued uninterrupted, as planned.

Second, MTC wrongly asserts that the Operating Trustee is controlled by Axia Canada. FSM, the Operating Trustee, assumed complete control of the Trust and day-to-day operations of Axia U.S. *Joint Application* at 7. Pursuant to the Trust agreement (“Trust Agreement”), reviewed by the WCB and executed between Axia Canada and FSM, the Operating Trustee was provided authority and a number of responsibilities, including, but not limited to, operating Axia U.S. as determined in the sole discretion of the Operating Trustee; exercising all rights, powers, authorities, privileges, and duties that had been possessed by the officers, directors, and managers of Axia U.S.; taking all actions to manage, maintain, and/or wind down the business operations of Axia U.S., including making legally required payments to creditors, employees, and agents in the ordinary course of business. *Id.* at 8-9. In order to assure continuity of service, Axia Canada (1) provided a loan to the Operating Trustee with repayment through the ordinary course of business; and (2) entered into the Services Agreement to continue to provide technical, security, and customer support services to Axia U.S. *Id.* at 6. The WCB reviewed the Trust Agreement and the Services Agreement.

Finally, and most clearly illustrative of the reasons to reject the MTC petition, the public interest, along with the Commission’s own rules, would be compromised by a retroactive revocation of the authority granted in this docket. Following the grant of authority to transfer control of the Section 214 authorization, Axia Canada transferred that control along with actual corporate control of Axia U.S. to the Trust. Revocation of the Commission’s grant of approval at this time would not unwind the corporate transfer. It would simply remove the authority for the Trust to control the Axia U.S. Section 214 authorization, throwing the Trust and the company

into immediate non-compliance with the Commission's rules. Worse, if by some corporate magic as imagined by MTC in its petition, the revocation were accompanied by a transfer of actual control of Axia U.S. from the Trust back to Axia Canada, the effect would be a transfer of control of the Section 214 authorization to a foreign entity without Commission approval or Team Telecom review.

The public interest would be served by rejecting the MTC petition.

Conclusion

Neither request for relief sought by MTC -- revocation of approval for the Trust to control the Axia U.S. Section 214 authorization and forcing of an unauthorized foreign control of the Section 214 authorization -- would serve the public interest. Rejection of the Petition would reaffirm the wisdom of Commission precedent in steering clear of involvement in contract and litigation disputes between parties. The Commission should dismiss the MTC Petition for Reconsideration.

Respectfully submitted,



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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Joint Opposition to MTC's Petition for Reconsideration was filed on the Commission's ECFS system and served on September 2, 2016, upon the following by email and by First Class Mail:

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